In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-376

ONE LOT EMERALD CUT STONES AND ONE RING,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On September 8, 1970, the United States commenced a forfeiture action in the United States District Court for the Southern District of Florida against one lot of emerald cut stones and one ring seized by Customs agents from Francisco Farkac Klementova on June 5,

1969. The complaint alleged that the emeralds and the ring had been brought into the United States by means of a false or fraudulent declaration or statement in that they had not been included in a declaration and entry, in violation of 19 U.S.C. 1497 and 18 U.S.C. 545.[1]

Klementova intervened to claim ownership and to urge that forfeiture was barred. He had previously been charged in a one-count indictment with having knowingly and willfully, with intent to defraud the United States, smuggled and clandestinely introduced the emeralds and ring into the United States, in violation of 18 U.S.C. 545. After a bench trial in the Southern District of Florida, he had been acquitted on that charge.[2]

The district court, relying on *Coffey* v. *United States*, 116 U.S. 436, *Ashe* v. *Swenson*, 397 U.S. 436, and *United States* v. *United States Coin and Currency*, 401 U.S. 715, concluded that the forfeiture action was punitive and was based upon the same transaction as the prior criminal prosecution, and held that forfeiture of Klementova's property under either 19 U.S.C. 1497 or 18 U.S.C. 545 was barred by the Double Jeopardy Clause of the Fifth Amendment (Pet. App. C, 13-20). The court of appeals reversed (Pet. App. A, 1-9) in an opinion reported at 461 F.2d 1189. The court of appeals

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[1] 19 U.S.C. 1497 makes subject to forfeiture articles not included in the declaration and entry. 18 U.S.C. 545 provides for forfeiture of articles fraudulently or knowingly imported contrary to law.

[2] The trial judge believed that Klementova intentionally failed to declare the merchandise but was not persuaded beyond a reasonable doubt that Klementova had intended to defraud the United States (Pet. App. A, 3).

agreed with the district court that the acquittal on the criminal charge under 18 U.S.C. 545 barred a subsequent forfeiture under that statute, but it concluded that a forfeiture under 19 U.S.C. 1497 was not barred. The court reasoned that the proof required under the latter statute need establish only that the merchandise was not included in a declaration and entry at the time it was brought into the United States and need not show an intent to defraud, as required for conviction under 18 U.S.C. 545.

As petitioner points out (Pet. 5), the decision below conflicts with the decision of the Court of Appeals for the Eighth Circuit denying forfeiture in *United States v. Two Hundred and One Fifty-Pound Bags of Furazolidone* (No. 71-1329, decided July 13, 1971), certiorari denied, 405 U.S. 964. In *Furazolidone,* forfeiture had been sought pursuant to both 18 U.S.C. 545 and 19 U.S.C. 1460 (the latter is a provision of the Tariff Act that decrees forfeiture of any merchandise brought into the United States from a contiguous country without being reported for inspection). Here, in addition to reliance on 18 U.S.C. 545, forfeiture was sought under 19 U.S.C. 1497, a provision of the Tariff Act providing for the forfeiture of imported merchandise not included in a declaration and entry. In that case, as here, the owner-claimant was acquitted of criminal violations of 18 U.S.C. 545. While both the Eighth Circuit and the court below concluded that forfeiture under 18 U.S.C. 545 is impermissible where the owner has been previously acquitted of criminal charges under that statute, their decisions conflict on whether forfeiture under the Tariff Act is permissible in such circumstances. Even

apart from the conflict among the courts of appeals,[3] lack of authoritative guidance in this difficult area of the law may cause confusion in the implementation of recent revisions to the Federal Rules of Criminal Procedure, dealing for the first time with forfeiture.[4]

In light of the foregoing considerations, we would normally acquiesce in the grant of certiorari here. We do not suggest the appropriateness of certiorari in this case, however, because we believe the result below, sustaining the forfeiture, is sound.[5] In addition, this Court

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[3] The Eighth Circuit's decision in *Furazolidone* is also in conflict with the decision of the First Circuit in *Leiser* v. *United States*, 234 F.2d 648, certiorari denied, 352 U.S. 893, where forfeiture was decreed under 19 U.S.C. 1497 after the owner had been acquitted of criminal charges under 18 U.S.C. 545.

[4] Rule 7(c)(2) provides:

> When an offense charged may result in a criminal forfeiture, the indictment or the information shall allege the extent of the interest or property subject to forfeiture.

Rule 31(e) provides:

> If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.

Rule 32(b)(2) provides:

> When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

[5] We disagree with that aspect of the court's ruling that holds the forfeiture impermissible under 18 U.S.C. 545. In our petition for a writ of certiorari in *Furazolidone*, No. 71-672, we elaborated our reasons for urging that forfeiture is proper under 18 U.S.C. 545 as well as under the Tariff Act.

denied certiorari in the *Furazolidone* case, raising the same issues, only last Term.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1972.

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